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9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 VICTOR C. JANSEN, an individual;
12 and RECisEXCEPTIONAL, a
13 Washington unincorporated association;

14 Plaintiffs,

15 vs.

16 REC SILICON INC, a Delaware
17 corporation; REC SOLAR GRADE
18 SILICON, LLC, a Delaware limited
19 liability company; and REC
20 ADVANCED SILICON MATERIALS
21 LLC, a Delaware limited liability
22 company, and the WASHINGTON
23 STATE DEPARTMENT OF
24 ECOLOGY, an agency of the State of
25 Washington;

Defendants.

No. CV-10-068-EFS

COMPLAINT FOR PENALTIES AND
DECLARATORY AND INJUNCTIVE
RELIEF

COMPLAINT FOR PENALTIES AND DECLARATORY
AND INJUNCTIVE RELIEF-1

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INTRODUCTION

1
2 1. This lawsuit seeks to halt the construction, start-up, and
3 operation of two industrial facilities (known as Silicon III and Silicon IV) in
4 Moses Lake, Washington. These plants are owned and operated by the REC
5 Silicon defendants that are American subsidiaries of the Norwegian
6 company known as Renewable Energy Corporation ASA (REC). REC's
7 business is carried out in three divisions. One of those divisions, REC
8 Silicon, is among the world's largest producers of polysilicon and silane gas.
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11
12 2. The manufacturing process at the Moses Lake facility involves
13 large inventories of explosive, flammable, and deadly chemicals. The reactor
14 vessels, miles of pipe races and tubing, and sprawling processing areas
15 involve dozens of regulated and unregulated emission points for criteria
16 pollutants, hazardous, and toxic releases. When a silane gas cloud is
17 released from the facility at concentrations greater than 4% the silane gas
18 combusts spontaneously and creates a drifting, flaming or oxidizing cloud
19 that spreads a plume of contamination over a large area. When workers
20 without protective clothing are exposed to a cloud of silane gas in industrial
21 accidents, their lungs crystallize, resulting in permanent injury and death.
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1 3. The manufacturing processes at the Moses Lake facility involve
2 more than volatile and explosive chemicals. These substances are handled
3 under extraordinarily dangerous conditions. These processes involve high
4 pressure, extreme temperatures, and routine and unplanned releases of
5 hazardous and toxic pollutants, notably hydrogen chloride (HCl) and silane
6 gas. The facility has a potential to emit more than 100 tons of particulate
7 matter annually, including large amounts of invisible particulate identified as
8 PM₁₀ and PM_{2.5}. The PM₁₀ and PM_{2.5} emissions from REC Silicon are
9 so small that they are respired deeply and permanently into the lungs
10 because these pollutants cannot be filtered by the human body or expelled.
11

12 4. REC Silicon and the Washington Department of Ecology have
13 been unable to determine whether the silane gas released from the facility at
14 regulated emission points, at unregulated bleed valves, and as fugitive
15 emissions, are properly evaluated as an emission of toxic silane or an
16 emission of particulate matter, or both.
17

18 5. The effects of routine air pollution from the Silicon III and
19 Silicon IV facilities--and the potential for catastrophic releases--leave no
20 margin for guesswork or error. As described in this complaint, the facility
21 has been the source of repeated and on-going violations of the federal Clean
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1 Air Act and its Washington counterpart. The result has been unpermitted
2 construction and expansion, unquantified and unregulated emissions,
3 explosions, multiple fires, worker injuries, and a long list of repeated and
4 ongoing regulatory violations including the failure of REC Silicon to adhere
5 to emission limits and permit conditions.
6

7
8 6. The construction of Silane III and Silane IV, which occurred
9 without the proper design review and permits, and without reliable data in
10 REC Silicon's permit applications, allowed the establishment of new and
11 modified pollution sources without the required assurance that the facility
12 properly qualified as an artificially limited or "synthetic" minor source.
13 REC Silicon's operational history demonstrates that emissions called
14 "accidental" or "emergency" releases are actually recurring and routine
15 releases. If so, then REC Silicon is required to obtain--and should have
16 obtained--a full operating permit under the Title V program under the Clean
17 Air Act.
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21 7. These facts are documented by the regulatory staff who
22 attempted to evaluate REC Silicon's inaccurate submissions. These
23 questions remained unanswered through the date of the current permit,
24 Notice of Construction Approval Order No. 10AQ-E330.
25

1 8. As set forth in this complaint, REC Silicon's repeated and
2 continuing violation of permit standards and the pre-construction design
3 review requirements under the Clean Air Act, and the encouragement and
4 accommodation of REC Silicon's illegal construction and operation by the
5 Washington State Department of Ecology, has resulted in an illegal,
6 incomplete, and unenforceable permit and threatens the health, safety, and
7 environmental interests of the plaintiffs and the Moses Lake community.
8
9

10 **JURISDICTION AND VENUE**

11
12 9. The federal Clean Air Act (CAA) authorizes the filing of citizen
13 enforcement suits in federal court under 42 U.S.C. § 7604, thereby invoking
14 the federal question jurisdiction of the federal district courts. 28 U.S.C. §
15 1331.
16

17 10. The Plaintiffs allege that REC Silicon and the Washington State
18 Department of Ecology have repeatedly violated and are presently violating
19 permitting requirements, emission standards and limitations, and existing
20 orders and requirements under the Clean Air Act and the regulations
21 federally approved in the delegated Washington State Implementation Plan
22 (Washington SIP). 42 U.S.C. § 7604(f).
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1 11. Venue is proper in the federal district court in which the alleged
2 violating source is located. 42 U.S.C. § 7604(c)(1).
3

4 12. The REC Silicon facilities, including Silicon III and Silicon IV,
5 are located within the city limits of Moses Lake, Washington and, therefore
6 venue is proper in the United States District Court for the Eastern District of
7 Washington.
8

9 **PARTIES & STANDING**

10 13. The Plaintiff Victor C. Jansen is a resident of Grant County,
11 Washington and an owner of a 61-acre tract of real estate immediately
12 adjacent to and south of the REC Silicon property that is the subject of this
13 litigation.
14

15 14. Victor C. Jansen's use and enjoyment of his real property is
16 directly impacted by air emissions and contaminants from REC Silicon's
17 existing and proposed operations.
18

19 15. Victor C. Jansen's interests in clean air, and freedom from
20 exposure to excessive pollution, are within the zone of interests that the
21 federal Clean Air Act (42 U.S.C. § 7401 *et seq.*) was adopted to protect.
22

23 16. Victor C. Jansen, as the immediately adjacent property owner,
24 has suffered injury in fact because the illegal construction, failure to obtain
25

1 required permits, and illegal operation of REC Silicon's facilities directly
2 invade his property and make his property unmarketable.

3
4 17. Plaintiff RECisEXCEPTIONAL is a Washington
5 unincorporated association whose members live or work in the greater
6 Moses Lake area. These members' health, enjoyment, and livelihood depend
7 on clean air, protection from hazardous and toxic releases, and the ability to
8 participate in a substantial and meaningful way in environmental decisions
9 that affect their lives and the health and prosperity of their community.
10

11
12 18. RECisEXCEPTIONAL sponsors an internet-based community
13 forum, <http://www.RECisEXCEPTIONAL.com>. The purpose of
14 RECisEXCEPTIONAL is to facilitate and encourage broader public
15 communication with government regulators and greater accountability by
16 the local, state, and federal agencies that are responsible for land-use
17 permitting, environmental protection, and worker and community safety
18 associated with REC Silicon's industrial facilities in Moses Lake.
19
20

21 19. Prior to commencing suit, Victor C. Jansen and
22 RECisEXCEPTIONAL gave sixty days' prior notice of their intent to sue.
23 That notice was provided to the United States Environmental Protection
24
25

1 Agency (EPA), the State of Washington, and the violators. A copy of the
2 notice, and the distribution list, is attached as Exhibit A.

3
4 20. The allegations in Exhibit A are incorporated by this reference.

5 21. Defendants REC Silicon Inc; REC Solar Grade Silicon, LLC;
6 and REC Advanced Silicon Materials LLC (collectively referred to as REC
7 Silicon) constructed, modified, and operated the industrial facilities known as
8 Silicon III and Silicon IV, which are sources of air pollution and contaminants
9 that are subject to regulation under the federal Clean Air Act and the
10 Washington Clean Air Act.
11
12

13 22. Defendant Washington State Department of Ecology is a
14 regulatory agency of the State of Washington that is charged with
15 implementing and enforcing the regulatory responsibilities delegated to the
16 State of Washington by the US Environmental Protection Agency (EPA)
17 under the federal Clean Air Act.
18
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20 **FACTUAL ALLEGATIONS**

21 23. On or about August 16, 2006, REC Silicon commenced
22 constructing major modifications to its existing facilities and the
23 construction of a new \$600 million facility that was intended to add 6,500
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25

1 metric tons of capacity using a proprietary process that produces a granular
2 solar grade polysilicon in fluid bed reactors.

3
4 24. REC Silicon started and substantially completed construction of
5 Silicon III, without applying for a permit under Title V of the Clean Air Act,
6 known as an Air Operating Permit. 42 U.S.C § 7661
7

8 25. REC Silicon started and substantially completed construction
9 of Silicon III, prior to obtaining a Notice of Construction Order in violation
10 of the federally approved rule for New Source Review. WAC 173-400-100.
11

12 26. A Notice of Construction Order can only be issued by the
13 Department of Ecology after completion of a mandatory design review and
14 approval process.
15

16 27. Permanent construction is strictly and explicitly prohibited at
17 any time prior to the issuance of a lawful approval order and the completion
18 of any appeals or judicial review.
19

20 28. The permitting process involves a number of procedural,
21 technical and substantive steps that can only occur at the design stage prior
22 to construction. These steps involve (a) identifying and quantifying the
23 types and amounts of contaminants that the facility has the potential to emit;
24 (b) determining whether the facility requires a full Title V Air Operating
25

1 Permit; (c) determining whether voluntary limits on production, operations,
2 or design will allow a major source to side-step the requirements of a full
3 Title V permit and be classified as a "synthetic" or "artificial" minor source;
4 (d) analyzing alternatives to achieve the maximum pollution reduction and
5 selecting the Best Available Control Technology (BACT) for each
6 individual source of pollutants, including toxic emissions; (e) analyzing
7 impact areas and evaluating health impacts on the affected population; (f)
8 determining which pollution control technologies to employ; (g) calculating
9 and establishing emission standards and limitations; (h) preparing
10 monitoring schedules and testing protocols to assure that the facility impacts
11 can be measured, reported, and enforced; and (i) assuring that the proposed
12 permit meets the public interest by subjecting it to meaningful public review,
13 comment, and modification after all of the required information is assembled
14 and analyzed.
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20 29. For both Silicon III and Silicon IV, REC Silicon completed its
21 designs internally and commenced construction illegally prior to obtaining a
22 Notice of Construction Order.
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1 30. REC Silicon's failure to comply with New Source Review for
2 Plant IV was a repeat violation, a continuing violation, and a violation that
3 can occur in the future.
4

5 31. The State of Washington, including the Office of the Governor,
6 offered money, subsidies, and other promises and incentives to REC Silicon
7 if REC Silicon would agree to build the Silicon III and Silicon IV plants in
8 Washington State. One of the inducements demanded by REC Silicon was
9 expedited permitting on the schedule demanded by REC Silicon.
10

11 32. The Department of Ecology was fully aware of REC Silicon's
12 illegal construction of the Silicon III industrial facility, but took no action to
13 challenge or stop construction.
14

15 33. The Department of Ecology allowed construction to continue
16 on Silicon III in violation of the requirements for new source review under
17 the Clean Air Act.
18

19 34. When REC Silicon designed and built Silicon III and modified
20 its existing polysilicon plant, it did so knowingly and deliberately without a
21 valid Notice of Construction order or an Air Operating Permit.
22

23 35. REC Silicon actively sought permission from the Washington
24 State Department of Ecology to continue violating New Source Review for
25

1 Silicon III and to obtain prospective approval to violate New Source Review
2 for Silicon IV in the future.

3
4 36. In February 2008 senior representatives of REC Silicon met
5 with the Director of the Department of Ecology to obtain permission and
6 reassurance that the Department of Ecology would exempt REC Silicon
7 from the pre-construction design review provisions of New Source Review.
8

9 37. In violation of state and federal law, the Department of Ecology
10 Director granted REC Silicon's request and assured REC Silicon that the
11 Department of Ecology would not take enforcement action against REC
12 Silicon even if it proceeded illegally and in violation of New Source review.
13

14 38. Under the delegation of authority from EPA to the Department
15 of Ecology, the Ecology Director has no power to authorize illegal
16 construction or to issue variances.
17

18 39. On February 5, 2008, Department of Ecology Director Jay
19 Manning informed senior staff in the Governor's office and the management
20 team in the air quality program that he had assured REC Silicon that the
21 Department of Ecology would not take enforcement action if REC Silicon
22 chose to proceed without the required permits or Notice of Construction
23 Approval order.
24
25

1 40. In 2008 REC Silicon commenced a \$688 million construction
2 project for the Silicon IV plant prior to obtaining the mandatory review and
3 approval. That construction involved modifications to existing REC
4 facilities, including Silicon III.

6 41. In both cases, and as repeat and continuing violation of New
7 Source Review, REC commenced construction of a major new air pollution
8 source and emission units without comprehensive environmental review,
9 without filing a complete permit application with the Department of
10 Ecology, without performing the required analyses, without obtaining the
11 required public review, and without obtaining a pre-construction Notice of
12 Construction Approval Order or a Title V permit.

14 42. REC Silicon eventually filed an application for construction of
15 Silicon IV in August 2008, but the application was materially incomplete.

17 43. At no time in the following nineteen months, as REC Silicon's
18 illegal construction continued, was the Department of Ecology able to certify
19 or declare that REC Silicon's application for modification of Plant III and
20 construction of Plant IV was "complete."
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1 44. A declaration of "completeness" confirms that the required
2 information is available necessary. This is a regulatory step in order for
3 permitting to proceed.
4

5 45. REC Silicon's application materials and submittals could not be
6 certified as complete because they are inaccurate, contain false assumptions,
7 and make material omissions. REC Silicon refused or failed to provide the
8 information necessary to perform New Source Review.
9

10 46. On March 6, 2009, in violation of the permitting requirements
11 under state and federal law, the Department of Ecology acted on REC
12 Silicon's belated and incomplete application by issuing a regulatory
13 document called a "Preliminary Determination," and initiating public
14 review.
15
16

17 47. A preliminary determination serves as a draft permit under the
18 Clean Air Act.
19

20 48. In the Technical Support Document (TSD) supporting the
21 "Preliminary Determination," the permit writer identified essential
22 information and analyses that had been requested by the Department of
23 Ecology, but not provided by REC Silicon.
24
25

1 49. Under the federally mandated and approved regulation (WAC
2 173-400-171), the public review of REC Silicon's draft permit could not be
3 lawfully completed because all of the information lawfully required by the
4 Department of Ecology had not been submitted and the necessary applicant
5 information was not available for public review.
6

7 50. The required information has never been submitted by REC
8 Silicon or made available for public review by the Department of Ecology.
9

10 51. On information and belief, REC Silicon failed to submit the
11 required information because the information had not been developed as
12 required, and the known information and analyses would have been
13 unfavorable to the permit limits REC Silicon sought to achieve and would
14 have triggered the requirement for REC Silicon to obtain a permit under the
15 Title V program.
16

17 52. In the absence of the required information, the Department of
18 Ecology could not perform the necessary analyses to issue a proper permit,
19 including the required determination of potential to emit and the analysis of
20 alternatives necessary to determine the Best Available Control Technology
21 (BACT) for the new and modified sources at the facility.
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1 53. In the absence of required information the Department of
2 Ecology permit writer decided to utilize a procedure called "presumptive
3 BACT" to set an arbitrary BACT level.
4

5 54. The "presumptive BACT" procedure is not authorized under
6 federal law or the federally approved Washington SIP.
7

8 55. The setting of a "presumptive BACT" limit fails to follow the
9 required analytical methods.
10

11 56. The setting of a "presumptive BACT" sets emission limits
12 without the requisite certainty that the limits and protections will ever be
13 achieved in the operation of the facility.
14

15 57. Legally, a "presumptive BACT" limit may not be enforceable
16 because "presumptive BACT" limits can only be adopted and employed
17 after notice and comment rule-making, which did not occur in this case.
18

19 58. The Washington State Department of Ecology acted arbitrarily
20 and outside the authority of its federal delegation of New Source Review by
21 imposing presumptive BACT as opposed to performing the required BACT
22 and tBACT analyses.
23

24 59. The Department of Ecology held a limited public hearing on
25 REC Silicon's incomplete application and draft permit on April 16, 2009.

1 That hearing was premature and did not satisfy the public participation
2 requirements of the delegation for New Source Review to the Department
3 of Ecology under the federally approved regulation at WAC 173-400-171.
4

5 60. The public hearing itself failed to qualify as meaningful public
6 participation because REC Silicon engaged in several actions to discourage,
7 frustrate, and limit public review.
8

9 61. REC Silicon's management conducted press interviews and
10 provided an official pre-hearing presentation that materially misrepresented
11 the status of the illegal new construction on-site and falsely stated that the
12 necessary environmental controls and monitoring procedures were in place
13 at REC Silicon's existing facilities, including Silicon III.
14
15

16 62. REC Silicon management attempted to silence critics of the
17 expansion, including Victor C. Jansen, by financial pressure.
18

19 63. REC Silicon sheltered critical documents from public review by
20 the wholesale marking of application submittals as "confidential" and taking
21 other steps to shield necessary information from public review by overly
22 broad claims that documents were "proprietary" and, therefore, not available
23 for public review.
24
25

1 64. REC Silicon filed a SLAPP suit against plant opponents,
2 including Victor C. Jansen, because of their role in criticizing the design and
3 construction of the facility without permits.
4

5 65. The term "SLAPP" stands for "strategic lawsuit against public
6 participation." SLAPP suits violate Washington law because they have a
7 chilling effect on public participation and communication with regulatory
8 agencies. RCW 4.24.510
9

10 66. REC Silicon and the Washington Department of Ecology have
11 never satisfied the public participation requirements for approving the
12 construction or operation of Silicon IV.
13

14 67. Without the permitted equipment, pollution controls and
15 monitoring capability, REC Silicon attempted to hot start the Silicon III
16 plant in March 2009.
17

18 68. After approximately 10 days of operation the plant failed and
19 had to be shut down.
20

21 69. For several months the Silicon III start-up was sporadic and
22 unsuccessful, causing worker injury, fires, instability, chemical releases, and
23 numerous regulatory violations.
24
25

1 70. On information and belief, regulatory violations that are known
2 to REC Silicon have not been reported to the Department of Ecology.
3

4 71. On information and belief, during the start-up period, REC
5 Silicon was operating modifications and emission points at Silicon III that
6 had not been disclosed, permitted, or otherwise approved for use.
7

8 72. In June 2009 the Department of Ecology inspected Silicon III
9 and found that the facility had not been constructed according to the
10 approved plans, unauthorized equipment was installed, and pollution
11 controls, testing plans, and monitoring equipment were not in place and had
12 not been prepared on the schedule required in the permit.
13

14 73. These findings were later confirmed and expanded by a formal
15 audit conducted by the engineering firm CH₂M Hill.
16

17 74. The CH₂M Hill audit report concluded that installed equipment
18 did not match permitted equipment.
19

20 75. The CH₂M Hill audit report concluded that emission points at
21 the facility were not authorized in the current permit or the new permit that
22 had been made available for public review.
23
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1 76. The CH₂M Hill audit report concluded that equipment
2 specifications did not correspond to the requirements of the current permit or
3 the new permit that had been made available for public review.
4

5 77. The CH₂M Hill audit report concluded that the emission
6 sources shown on the plot plans did not match the locations that had been
7 used for modeling emission impacts in the current permit and in the new
8 permit that had been made available for public review.
9

10 78. The findings made by CH₂M are attached to Exhibit A and are
11 incorporated herein as allegations of known violations under the federal
12 Clean Air Act, violations of REC Silicon's permit, examples of violations
13 that are repeated by REC Silicon, and on-going violations.
14
15

16 79. The Department of Ecology took no enforcement action against
17 REC Silicon arising from the violations identified in the CH₂M audit.
18

19 80. In June through November 2009, the Department of Ecology
20 documented a series of additional violations by REC Silicon, but the
21 Department of Ecology did not impose monetary penalties as a deterrent,
22 obtain assurances of discontinuation, or institute any enforcement actions in
23 state or federal court.
24
25

1 81. On September 8, 2009 REC Silicon disclosed for the first time
2 that silane gas is routinely released in unmeasured quantities through a
3 hydrogen recycle vent, identified as A14, without emission controls or the
4 ability to collect monitoring information.
5

6 82. This uncontrolled release is not permitted and is not exempt
7 from permitting.
8

9 83. On September 8, 2009 REC Silicon disclosed that the only
10 control available for a Maintenance Scrubber, identified as B19, was the
11 unapproved intermittent use of the Process Scrubber (B18).
12

13 84. This release is not permitted through the Process Scrubber.
14 REC Silicon's alleged emission control technique is not authorized by
15 permit or law.
16

17 85. In early October 2009, the Department of Ecology learned that
18 two major pollution control devices at REC Silicon were failing to meet
19 permit limits, presumably on an on-going basis each time those emission
20 sources operate.
21

22 86. The required 3-stage scrubber failed to meet particulate matter
23 concentration and emission rate limits established in the existing REC
24 Silicon permit. The scrubber was so poorly operated and controlled,
25

1 according to the investigator, that the source exceeded the particulate
2 emission rate for uncontrolled general process units or open vents.

3
4 87. A required scrubber, identified by Department of Ecology
5 inspectors, was allowing emissions of toxic hydrogen chloride (HCl) to
6 exceed REC Silicon's authorized permit limit.

7
8 88. In regard to both emission sources, REC Silicon has not been
9 able to demonstrate that equipment ever met the limits imposed by permit in
10 the past or that the equipment can achieve in practice the required limits on a
11 continuous basis.

12
13 89. On October 27, 2009 REC Silicon acknowledged that required
14 filter failure and other monitoring devices for emission sources that were
15 required under the permit had not been installed at the required times and
16 that additional, unauthorized delays would be required to achieve
17 compliance at some projected time in the future. This included, for example,
18 a lengthy and unauthorized delay for installation of a required flow meter on
19 the hydrogen vent, identified as A-14.

20
21
22 90. From time to time the Department of Ecology provided REC
23 Silicon with written notice of some of the known, repeat, and continuing
24 violations. Through the date of suit, however, the Department of Ecology
25

1 has failed to impose any monetary penalties or take any enforcement action
2 in state or federal court. REC Silicon has provided no assurance of
3 discontinuance for any of the on-going or repeat violations.
4

5 91. The Department of Ecology has repeatedly granted REC
6 Silicon informal compliance schedules without following the required
7 procedures under WAC 173-400-161, which is a federally approved
8 regulation and requires public review and comment under WAC 173-400-
9 171. Informal compliance schedules do not legalize the offending conduct.
10

11 92. As of December 22, 2009 the Department of Ecology had not
12 received any of the required justification or quantification for routine,
13 unpermitted emissions in Silicon III and proposed for Silicon IV for "bleed
14 points." These routine emissions were omitted from REC Silicon's
15 applications and disclosures and, therefore, could not be quantified or
16 evaluated by the Department of Ecology or the public.
17

18 93. As late as December 30, 2009 REC Silicon had not provided
19 the information required by the Department of Ecology necessary to issue a
20 revised Preliminary Determination for public review or a Notice of
21 Construction Order.
22
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1 94. On December 30, 2009 REC Silicon confirmed that neither the
2 Process Scrubber nor the Metal Chloride Scrubber could attain the limits for
3 particulate (PM₁₀) and hydrochloric acid (HCl) in the proposed permit.
4

5 95. In January 2010, the Department of Ecology abandoned its
6 announced plans to issue a revised Preliminary Determination to REC
7 Silicon and to submit the revised draft permit to public comment as required
8 by WAC 173-400-171, which is enforceable as a federally approved element
9 of the Washington SIP.
10

11 96. DOE issued Notice of Construction Order of Approval No.
12 10AQ-E330 on January 7, 2010 without legal foundation or authority, on an
13 incomplete application, and without the required public review and
14 comment.
15

16 97. Notice of Construction Order of Approval No. 10AQ-E330 is
17 not a lawfully promulgated approval order under federal law or the federally
18 authorized Washington SIP.
19

20 98. Notice of Construction Order of Approval No. 10AQ-E330 is
21 not a final order and provides no authority for REC Silicon to continue to
22 construct Silicon IV, to modify Silicon III, or to operate the combined
23 facilities.
24
25

1 99. Each day of construction or operation by REC Silicon without a
2 lawful, final order is a continuing violation.
3

4
5 **CAUSES OF ACTION**

6 Plaintiffs reallege Paragraphs 1 through 99, above.
7
8

9 **Violation of New Source Review**

10 100. REC Silicon violated the state and federal law under the Clean
11 Air Act for "New Source Review" by commencing construction of Silicon
12 III prior to receiving a Notice of Construction Order.
13

14 101. REC Silicon violated state and federal law under the Clean Air
15 Act for "New Source Review" by commencing construction of Silicon IV
16 prior to receiving a Notice of Construction Order.
17

18 102. REC Silicon has not received a "final" Notice of Construction
19 Approval Order because Order No. 10AQ-E330 for Plant IV was issued by
20 the Department of Ecology without legal authority and, under state and
21 federal law, no such order is effective until it becomes a "final" order. An
22 approval order does not become final until 30 days after issuance and, if
23
24
25 timely appealed, until all appeals have been decided.

COMPLAINT FOR PENALTIES AND DECLARATORY
AND INJUNCTIVE RELIEF-25

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1 103. REC Silicon's violations of "New Source Review" are repeat
2 violations and continuing violations for which REC Silicon is liable for
3 statutory penalties and costs under state law (\$10,000 per day per violation)
4 and federal law (\$32,500 per day per violation, plus the adjustments called
5 for by regulation).
6
7
8

9 **Violation of Permit Standards & Limitations**

10 104. REC Silicon has engaged in the violations of permit standards
11 and limitations identified in Paragraphs 1 through 103, including any
12 additional and on-going violations established through the date of trial.
13

14 105. REC Silicon has engaged in repeated and continuing violations
15 involving unpermitted emission sources, violation of recordkeeping
16 requirements, failure to install pollution control and monitoring equipment,
17 failure to monitor and conduct tests, and exceeding emission limits.
18
19

20 106. REC Silicon operated and continues to operate equipment that,
21 according to REC Silicon engineers, cannot attain the emission limits for
22 particulate (PM) and hydrogen chloride (HCl) on each day that equipment
23 operates.
24
25

1 107. Each of REC Silicon's violations of permit standards and limits
2 are separate, repeat, and continuing violations for which REC Silicon is
3 liable for statutory penalties and costs under state law (\$10,000 per day per
4 violation) and federal law (\$32,500 per day per violation, plus the
5 adjustments called for by regulation).
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9 **Declaratory & Injunctive Relief**

10 108. The Washington State Department of Ecology has mandatory
11 and non-discretionary duties by virtue of the responsibilities delegated to
12 Ecology by the Environmental Protection Agency and established as a
13 matter of federal law in the approved Washington SIP.
14
15

16 109. A present controversy exists whether the procedural and
17 substantive defects in Notice of Construction Approval Order No. 10AQ-
18 E330 are so material that the approval order was issued without foundation
19 or lawful authority and, therefore, the order has no legal basis or effect.
20

21 110. A present controversy exists whether the Notice of
22 Construction Approval Order No. 10AQ-E330 is a "final" order that
23 authorizes continuing construction or operation of Silicon III and Silicon IV
24 by REC Silicon.
25

1 111. The Court has jurisdiction to decide whether Notice of
2 Construction Approval Order No. 10AQ-E330 is legally valid and operative
3 under federal law.
4

5 112. The Court has jurisdiction to decide whether Notice of
6 Construction Approval Order No. 10AQ-E330 authorizes REC Silicon to
7 continue constructing Silicon IV prior to exhaustion of all appeals and
8 judicial review.
9

10 113. The Court has jurisdiction to enjoin the Department of Ecology
11 from further violation of the federally mandated and approved Washington
12 SIP for New Source Review.
13

14 114. The Court has jurisdiction to order the Department of Ecology
15 to withdraw Notice of Construction Approval Order No. 10AQ-E330 in
16 order to perform the analyses required under the federally approved
17 Washington SIP and to submit the proposed REC Silicon permit to public
18 comment and review as required by the federally approved Washington SIP.
19
20

21 115. The Court has jurisdiction to enjoin REC Silicon from
22 constructing and operating the Silicon III and Silicon IV plants until after
23 REC Silicon has obtained a final, legal Notice of Construction Order or a
24 Title V Air Operating Permit for the facility.
25

RELIEF REQUESTED

PLAINTIFFS request the following relief:

1. That the Court award statutory penalties, in the maximum amounts plead, jointly and severally against the REC Silicon defendants for each day of each repeat or continuing violation of the New Source Review under the federal Clean Air Act and the Washington Clean Air Act, including each day of construction or operations by REC Silicon without the required permits;

2. That the Court award statutory penalties, in the maximum amounts plead, jointly and severally against the REC Silicon defendants for each day of each repeat or continuing violation of the permit standards or emission limits by REC Silicon;

3. That the Court declare that Notice of Construction Approval Order No. 10AQ-E330 is procedurally and substantively defective under federal law, not a legal order, and of no legal force or effect;

4. That the Court declare that Notice of Construction Approval Order No. 10AQ-E330 does not authorize REC Silicon to continue constructing or operating Silicon IV prior to exhaustion of all appeals and claims for judicial relief;

COMPLAINT FOR PENALTIES AND DECLARATORY
AND INJUNCTIVE RELIEF-29

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1 5. That the Court enjoin the Department of Ecology from violating
2 the Washington SIP requirements for New Source Review and prohibit
3 Ecology or its Director from granting pollution sources freedom from
4 enforcement for current, future, and on-going violations of the Clean Air
5 Act;
6

7
8 6. That the Court order the Department of Ecology to withdraw
9 Notice of Construction Approval Order No. 10AQ-E330 in order to perform
10 the required analyses and to submit the proposed REC Silicon Notice of
11 Construction Approval Order as a "Preliminary Determination" for public
12 comment and review;
13

14 7. That the Court enjoin REC Silicon from constructing and
15 operating the Silicon III and Silicon IV plants until after it has obtained a
16 final, legal Notice of Construction Order or a Title V Air Operating Permit;
17

18 8. That the Court award up to \$100,000.00 in additional penalties
19 under 42 U.S.C. § 7604(g)(2) to offset the damage REC has done to the
20 community;
21

22 9. That the Court award the Plaintiffs their actual expert fees,
23 attorneys' fees and litigation expenses under 42 U.S.C. § 7604(d); and
24

25 10. For such other relief as the Court deems just and equitable.

1 RESPECTFULLY submitted March 16, 2010.

2 McELROY LAW FIRM, PLLC

3
4 /s/ Gregory S. McElroy

5 Gregory S. McElroy, WSBA No. 15494

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